Supreme Court, U.S.
FILED
MAY 20 2002

No. 01-1553

IN THE
Supreme Court of the United States

THE STATE OF OHIO,

Petitioner,

v.

MATTHEW REINER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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Respondent, Matthew Reiner, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari of Petitioner, the State of Ohio.

STATEMENT OF JURISDICTION

The Court lacks jurisdiction to decide the questions presented because the judgment below is based entirely on the Ohio Supreme Court's interpretation and application of an Ohio statute and involves no question or issue of federal law. 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is argumentative and incomplete, and the portion that purports to describe the opinion of the Ohio Supreme Court bears no relationship whatsoever to the actual opinion.[1] Hence, this Statement.

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1. For instance, Petitioner places quotes around the term "super privilege" and implies it is a quote from the Ohio Supreme Court's opinion. In truth, it is entirely the creation of Petitioner.

The Petition is likewise flawed in its wholesale failure to meet the explicit requirements of Supreme Court Rule of Practice 14.1(g)(i), designed to ensure that the Petition clearly shows "that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Nowhere does the Petition, which seeks review of a state-court judgment, specify (i) "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; (ii) the method or manner of raising them; (iii) the way in which they were passed on by those courts; or (iv) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears.

(Cont'd)

This Court reversed an earlier judgment of the Ohio Supreme Court on the ground that the Ohio Supreme Court had erroneously held that a witness' assertion of innocence deprived her of her Fifth Amendment privilege against self-incrimination. *Ohio v. Reiner*, 532 U.S. 17, 22 (2001). In that opinion, this Court, of course, refrained, as it must, from addressing the purely state-law question of "whether immunity from suit under [Ohio Revised Code] § 2945.44 was appropriate." *Id.* And this Court remanded the case to the Ohio Supreme Court for consideration of that question.

The Ohio Supreme Court strictly followed the terms of the remand. In accordance with this Court's holding, the Ohio Supreme Court reversed its earlier judgment "to the extent that it held that [the witness] lacked a valid Fifth Amendment privilege against self-incrimination." *State v. Reiner*, 93 Ohio St. 3d 601, 604 (2001). The Court then turned to the state-law issue: whether the grant of immunity was proper under the controlling state statute.

The Court ruled it was not, because the grant did not "further the administration of justice" and therefore was not proper under the explicit terms of the statute. *Id.*

(Cont'd)

This failure is understandable, because, as shown in Section C., below, Petitioner has ereated its federal constitutional arguments out of whole, and exceedingly transparent, cloth, and has raised them in the Petition for the first time in this case.

REASONS FOR DENYING THE WRIT

A. The decision below is one solely of state law.

The Petition seeks review of a final judgment by the Ohio Supreme Court on a unique question of Ohio statutory law: the interpretation and application of the Ohio statute authorizing the grant, by a state court, of immunity to a witness in a state-court proceeding. Ohio Rev. Code Sec. 2945.44. States, of course, are "absolutely free" to interpret state law. *Arizona v. Evans*, 514 U.S. 1, 8 (1995) And this Court has "no power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

The Petition strains, conspicuously, to conjure a federal constitutional question out of what is manifestly a pure state-law ruling. The Petition claims variously that the Ohio Supreme Court "amended" the Fifth Amendment, that the Ohio Supreme altered the "constitutionally-grounded" subject of governmental immunity by allowing for judicial review of prosecutor's decisions to grant immunity, and that, in doing these things, the Ohio Supreme Court somehow deprived the State of its right to due process.

These exaggerated claims are meritless. The text of the Ohio Supreme Court's decision makes clear that the court below limited itself to interpretation of the controlling state statute. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 S. Ct. 459, 463, 89 L. Ed. 789(1945), citing *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636, 22 L. Ed. 429 (1874); *Berea College v. Kentucky*, 211 U.S. 45, 53, 29 S. Ct. 33, 34, 53 L. Ed. 81

(1908); *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935).

As this Court has recently held, a state is free to make its own decisions regarding how best to address the various problems of law enforcement. *Arizona v. Evans, supra*, 514 U.S. at 8. In this instance, the Ohio immunity statute reflects the state legislature's considered judgment about the process by which immunity is to be granted in the state courts of Ohio. It is the province of the highest court of Ohio to make the definitive pronouncements regarding the meaning and application of that statute. And those pronouncements are not subject to this Court's revision. *Gurley v. Rhoden*, 421 U.S 200, 208 (1975); *Henry v. Mississippi*, *supra*, 379 U.S. at 447.

B. The Ohio immunity statute is unique.

The Petition claims that the Ohio Supreme Court has fundamentally disrupted the process by which government prosecutors grant immunity to witnesses whose testimony they seek. And the Petition supports this claim by citing federal precedents and decisions from several states — excluding Ohio.

Petitioner suggests that the Ohio Supreme Court has ignored both federal-court decisions about federal immunity statutes and state-court decisions about the immunity statutes of other states. Thus, Petitioner seems to suggest, the Ohio Supreme Court *must* be wrong about some overarching federal principle. This ploy reflects Petitioner's frantic search to find something other than a purely Ohio-law issue lurking in the Ohio Supreme Court's decision.

But Petitioner's effort is in vain. The Ohio immunity statute is unique in that, unlike its federal counterparts and, indeed, unlike its counterparts among the several states, it mandates judicial determination of whether an immunity grant sought by the State "furthers the administration of justice." Ohio Rev. Code Sec. 2945.44. If in the state court's view it does not, then an immunity grant is unlawful under the statute.

This express language in the Ohio statute, unlike any of the federal and state immunity statutes Petitioner seeks to compare, *requires* judicial review of the desire of prosecutors to grant immunity. Thus, the Petition's heavy reliance on federal and other state's authorities for the proposition that the judiciary lacks any authority to review immunity grants is utterly irrelevant. None of those statutes contains language requiring, or even permitting, a judicial determination, *before* immunity is granted, of whether immunity furthers the administration of justice, or is otherwise approrpriate. *See* 18 U.S.C. § 6002, interpreted in *Kastigar v. United States*, 406 U.S. 441 (1972); 18 U.S.C. § 6003, interpreted in *Pillsbury v. Conboy*, 459 U.S. 248 (1983), *McGee v. Crist*, 739 F.2d 505 (10th Cir. 1984) and Petitioner's other federal authorities; *see also* Connecticut General Statutes, Sect. 54-47(a), interpreted in *Morant v. State*, 68 Conn. App. 137 (2002).

In the precedents Petitioner relies on, the governing statute places with the prosecutor full, unreviewable authority regarding immunity grants. It is therefore not surprising that judicial decisions interpreting and applying those statutes have held that, as Petitioner construes it, "the court inserting itself into the propriety of the immunity grant is prohibited." Petitioner, at 8, citing *In re Candiotti*, 729 F. Supp. 840 (S.D. Fla. (1990) (interpreting 18 U.S.C. §§ 6002-6003).

But those cases, and the rule Petitioner derives, have nothing to do with this case. In the decision below, the Ohio Supreme Court did nothing more than rule dispositively "that the grant of immunity . . . resulted in serious prejudice to the defendant and did not further the administration of justice. R.C. 2945.44." *State v. Reiner*, 93 Ohio St. 3d 601, 604-05. This "is a question of state law on which only the Supreme Court of [Ohio] can speak with final authority." *See Alabama v. King & Boozer*, 314 U.S. 1, 9-10 (1941).

This ruling has no effect on the operation or application of the various federal immunity statutes or the immunity statutes of the several states. Its effect is limited to Ohio and the unique terms and conditions of Ohio's immunity statute.

C. The U.S. Constitution does not preclude a state legislature from providing for judicial review of grants of immunity; in any event, Petitioner's constitutional claims were not raised, briefed, or decided below.

The Petition strains mightily to conjure a constitutional issue out of what is manifestly a state-law issue. This is hard going, and the Petition eventually settles on the argument that a state prosecutor has a federal constitutional power (and, presumably, right) to grant immunity to whomever the prosecutor selects to receive it. *See* Petition, at 1, Reasons for Granting the Writ, first reason. From that shaky base, Petitioner argues that the Ohio Supreme Court's ruling "impermisssibly impinges" on that constitutional power. *Id.*, at 2. And Petitioner goes so far as to suggest that judicial review of immunity grants violates fundamental separation-of-powers doctrine. *Id.* at 8-9.

This argument reduces to a remarkable proposition: that the U.S. Constitution *prohibits* a state legislature from deciding, as a matter of public policy, that the judicial branch *of*

that state has the power to review prosecutorial grants of immunity. Therefore, the Petition argues, the Ohio statute, which empowers the judicial branch to review prosecutor's requests for immunity, and reject those that would not "further the administration of justice", is unconstitutional as an illegal infringement of the powers of the Executive Branch.

Stating the argument makes clear its invalidity. And if that weren't enough, one need only look at the actual content of Petitioner's separation-of-power argument. Petitioner acknowledges that the familiar separation-of-power considerations generally do not apply to state governments. *See* Petition, at 9 n.4, citing *Whalen v. United States*, 445 U.S. 684, 689 (1980). *See also Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not impose on the States any particular plan for the distribution of governmental powers.") But Petitioner then argues that such considerations do warrant attention here. And it advances this argument on the sole ground that in a 1996 decision, having nothing to do with immunity, the Ohio Supreme Court cited an opinion by Justice Cardozo regarding separation of powers. From that citation, Petitioner invokes *Michigan v. Long*, 463 U.S. 1032 (1983), to the effect that if a state court invokes federal law to resolve an issue of state law, this Court may address the federal question involved.

This jumbled logic has several notable flaws. First, the Ohio Supreme Court in this case did not invoke federal law to resolve any issue. It decided the case entirely and solely on state-law grounds. Second, it is understandable that the Ohio Supreme Court did not look to federal law to resolve the issue before it, since the federal immunity statutes are fundamentally different from Ohio's, in that they do not require judicial review of the

appropriateness of immunity grants. *Compare Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (where state and federal law are identical, state court's ruling may not be on independent and adequate state-law ground). Third, the Ohio Supreme Court in this case did not address any separation-of-powers issue, by reference to federal law or otherwise, because, among other reasons, no such issue was presented at anytime in the proceedings below.

Only in this Court, in this Petition, has Petitioner advanced its separation-of-powers argument. The argument is breathtaking in its novelty: that federal separation-of-powers doctrine prohibits the Ohio legislature from enacting an immunity statute providing for judicial review of prosecutors' requests for grants of immunity to witnesses.

The argument has no basis in law or logic. And it is not properly before this Court, because at no time in the state-court proceedings, and certainly not on remand following this Court's decision in *Ohio v. Reiner*, did Petitioner advance a claim, or explicitly or even by remote implication, that the Ohio immunity statute is unconstitutional. Therefore, even if the Petitioner's remarkable separation-of-powers contention had even facial plausibility — and it assuredly does not — the contention would not be a ground for issuance of the writ, since it was not raised, briefed, or decided in the proceedings below. *TRW, Inc. v. Andrews*, 534 U.S. 19, 122 S. Ct. 441, 451 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001).

D. A State is free to establish its own rules of standing to assert state-law rights in state-court proceedings.

Petitioner argues that the Ohio Supreme Court has somehow offended federal law by allowing Respondent to challenge the trial-court's decision to grant immunity in this case. *See Petition*, at 14-19.

This argument founders on the same inescapable fact that dooms Petitioner's earlier arguments: this is an issue of state law. A state Supreme Court's determination of standing to assert violations of state law is itself an issue solely of state law that is entirely and solely within the power of state courts to decide. This Court has long recognized that "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

The Ohio Supreme Court is free to decide that the Ohio immunity statute, which involves a judicial determination of whether an immunity grant furthers the administration of justice, permits a defendant affected by such a grant to challenge that determination on appeal. Nothing in the U.S. Constitution could possibly deprive the Ohio Supreme Court of that freedom.

Petitioner's reliance on decisions from federal courts and the courts of other states likewise fails, because, as noted above, the statutes at issue in those decisions are different from Ohio's immunity statute. Other state courts are free to conclude whatever they wish about standing under their state statutes. And it might well be logical for them to conclude that a criminal defendant has no standing to challenge an

immunity grant where the governing statute vests absolute discretion in the prosecutor, as Petitioner repeatedly says those statutes do. But those statutes, and decisions under them, have nothing to do with this case.

The Ohio Supreme Court interpreted and appled a unique Ohio statute. In doing so, the Court decided that, under state law, a criminal defendant has standing to challenge an immunity grant on the ground that, in violation of the explicit language of the statute, the grant did not "further the administration of justice." This state-law determination is rational, and, in any event, it raises no federal question.

CONCLUSION

There is no ground for this Court's jurisdiction. The writ should not issue.

Respectfully submitted,

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